The Distracting Debate Over Judicial Review

R. GEORGE WRIGHT*

I. INTRODUCTION

Of late, a number of our best legal thinkers have devoted much effort to developing principled theories about judicial review.[1] "Theory" here refers to normative, and not merely descrip-

* Lawrence A. Jegen Professor of Law, Indiana University School of Law–Indianapolis. The author extends his thanks for her assistance and counsel to Rachel Anne Scherer.

1. To cite merely a few contemporary leaders in this regard, see, for example, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); RICHARD D. PARKER,

tive, theories. That is, the reference is to theories of how legal practices should be and not merely to how they are.[2] The debate over judicial review includes theories that reject,[3] as well as those that endorse,[4] or are indifferent or mixed[5] in evaluating judicial review. There are also a wide range of possible forms of judicial review, with varying scopes and strengths.[6]

"HERE THE PEOPLE RULE:" A CONSTITUTIONAL POPULIST MANIFESTO (1994); JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (2005); LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT (1991) [hereinafter WALDRON, *Law and Disagreement*]; KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007). Among the vast law review literature of relevance, see, for example, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Erwin Chemerinsky, *Losing Faith?: America Without Judicial Review*, 98 MICH. L. REV. 1416 (2000); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) [hereinafter Waldron, *Judicial Review*].

2. Specifically, this refers to trying to determine what the Framers might have intended with respect to judicial review.

3. Among various possible examples, consider TUSHNET, *supra* note 1.

4. Among similarly varied possible examples, see SEIDMAN, *supra* note 1.

5. For something of a mixed or multi-level theory of judicial review, see, for example, CHOPER, *supra* note 1. However, even theories that are typically thought of as opposing judicial review, perhaps on democratic grounds, actually build in crucial limits, qualifications, and stipulations. *See, e.g.*, Waldron, *Judicial Review*, *supra* note 1, at 1352 (noting that "[i]t may still be the case that judicial review is necessary as a protective measure against legislative pathologies relating to sex, race, or religion in particular countries"). Crucially, Professor Waldron's case against judicial review presumes "a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights," whatever persisting disagreements may remain about the content of such rights. *See* Waldron, *Judicial Review*, *supra* note 1, at 1360. Even Professor Tushnet displays a real ambivalence among forms of judicial review or their absence. *See* TUSHNET, *supra* note 1, at 174.

6. *See, e.g.*, Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even if We Think It is, Should We Want the Supreme Court to so Rule?*, 41 GA. L. REV. 867, 869 (2007) (noting that "the judicial power to protect constitutionally entrenched human rights should be the power of judicial 'penultimacy,' not the power of judicial 'ultimacy,' it should be the power to have, not the last

Despite the prominence of such theories, this article will argue that all such theories are practically misguided. The game they allow people to play is not worth the candle thereby consumed. Briefly put, the rough idea is that once one controls for other relevant variables, the form of judicial review itself, if any, only minimally affects the overall moral value of the constitutional system. Thus, this article will not argue for or against any principled normative theory of judicial review on the merits. Instead, it will argue that the effort devoted to working out principled normative theories of judicial review would be more beneficial if devoted elsewhere. Considerations that can be separated from one's own principled normative theory of judicial review are normally judged far more morally weighty and rightly so.

These are complicated matters, but the basic idea is that one can start to consider the moral weight that many theorists ordinarily attach, rightly so, to a particular view, to particular constitutional outcomes, or to rules they deem to be crucial. These constitutional outcomes may or may not have resulted from the Supreme Court's exercise of judicial review. Any given theorist may evaluate the constitutional outcomes in strongly negative or strongly positive terms. In the most principled way, it is the most substantively morally and politically important constitutional outcomes, as judged by each theorist, that matters much more than whether the theorist arrived at them by means of some form of judicial review or not. Moral substance in constitutional law is thus largely independent of and typically outweighs the moral value, positive or negative, assumed to attach to some form of judicial review or its absence.

Of course, one cannot work through this argument in the introductory section. As will be discussed, a counterargument claims that some form of judicial review, or its absence, deeply matters. Some might claim that such a process embodies, on some theory, great positive or negative moral value. Alternatively, in what is already a sort of "weakened" claim or fall-back position, some might claim that such a process is not merely correlative to strongly favored constitutional outcomes but is realistically necessary to achieve such outcomes. Yet, one can address such perspective only briefly below.

---

word, but only the penultimate word: for example, a word that may be overruled by ordinary legislation").

As the argument and in particular the counterarguments unfold, this discussion will move beyond example and counter-example into the realm of contingency and sheer speculation. Yet, not all speculation is equally plausible. All told, this article will show good grounds for presuming that the popular practice of crafting principled normative theories about judicial review is largely a distraction.[7]

Concretely put, there are contemporary[8] and classic[9] defenses of some form of judicial review. However, judicial review is now[10] and has long been[11] contested and controversial. Referring to judicial review, Dean Harry Wellington observed that "[a]lmost every important case that displeases some sizable group leads to questions about the legitimacy of the . . . doctrine . . . ."[12] More recently, theorists have made related observations. Thus, Professor Dale Carpenter suggests that "a growing number of respected constitutional theorists, coming from a broad range of political and jurisprudential perspectives, have begun to question the legitimacy of judicial supremacy in constitutional interpretation."[13] Even more strongly, Professor Suzanna Sherry has asserted that "[p]opular unhappiness with particular decisions . . . has turned

---

7. It should be noted here that this discussion brushes past, but does not thereby commit self-contradiction, the claim that normative, principled theories of judicial review are a distraction. The discussion need not and does not herein defend or reject any theory of judicial review on the normative merits, and therefore, does not offer a normative theory of judicial review, distracting or otherwise. This is the least distracting approach to judicial review. For examples, see discussion *infra* Part IV.

8. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 70 (1985); SEIDMAN, *supra* note 1; Alexander & Schauer, *supra* note 1; Chemerinsky, *supra* note 1.

9. *See, e.g.*, the sources cited *infra* notes 33–36 and accompanying text.

10. *See, e.g.*, TUSHNET, *supra* note 1; Waldron, *Judicial Review*, *supra* note 1, at 1346.

11. *See, e.g.*, EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 1 (Peter Smith Pub. Inc. 1957) (1938).

12. Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 486 (1982) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

13. Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 406–07 (2003). Theorists often draw a distinction between "judicial supremacy" and the broader or weaker idea of "judicial review." *See infra* Part III.

into something deeper: a rejection of judicial review itself and a belief that judges should bow to the wishes of the popular majority."[14] More moderately, scholars have raised the idea of somehow balancing or drawing upon both popular, or democratic constitutionalism and judicial supremacy.[15]

Given the variety of possible approaches to judicial review, it is overwhelmingly tempting to try to choose among the possibilities based on the principled merits. One would "seek to transcend [one's] own immediate policy preferences"[16] on the underlying substantive legal issues involved in all cases or in any given case. One would then address questions of "the legitimacy of judicial review, its function and character in cases of constitutional law, and its harmony with democratic principles of government."[17]

The main thesis of this article, however, is that one should resist such apparent high-mindedness. The substantive merits of the underlying constitutional cases—past, present, or future—however one perceives them, instead tend to hold the attention, as should rightly be the case. Forms of judicial review, or their absence, in and of themselves, are usually of minimal independent normative value. People may care much more about judicial review in the future than about judicial review in the past, but no one is sure what the substantive moral and political effects of judicial review will be over the next quarter century. Even if people were to care more about judicial review in the future, this would hardly give a person a reason to like or dislike judicial review, on principle, independent of one's view of the merits of the particular moral and political effects of judicial review over the specified period of time.

To develop this thesis, this article will first briefly refer to some of the landmark United States Supreme Court cases on judicial review, with the barest indication of historical and contempo-

---

14. Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 U. CIN. L. REV. 1053, 1053 (2007). Note here the possibly broader reference not merely to judicial supremacy but to judicial review. *See id.*

15. *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1029 (2004) (contrasting the constitutional populism of Professor Larry Kramer).

16. LEONARD W. LEVY, *Judicial Review, History, and Democracy: An Introduction, in* JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS 1, 1 (1967).

17. *Id.*

rary commentary.[18] Next, this article will survey some representative forms and combinations of judicial review and judicial supremacy, and their absence, with reference to leading comparative institutions.[19] The argument then begins to unfold as this article distinguishes a concern for judicial review from a concern for the broadly moral or political substantive merits in a particular illustrative context.[20] This article will then expand the focus to highlight what many adopters of most political perspectives would view as the broadly mixed record of judicial review over the course of American judicial history.[21] Whether one generally favors or disfavors judicial review, almost any period of American judicial history offers grounds both generally and specifically to morally and politically crucial issues for encouragement and for regret in a sense of missed opportunity.[22]

From there, this will consider some of the commonly claimed, supposedly inherent, advantages of judicial review or its absence. Thus, this article will survey the debates over claims of judicial independence from politics or other social influences,[23] with a look at some of the accumulating social science evidence;[24] the related idea of judicial review as distinctively allowing for decision-making on the basis of principle;[25] minority rights under judicial review;[26] understandings of democracy under judicial review;[27] and the question of the relationship between settlement,[28] finality,[29] destabilization,[30] and judicial review. Finally, the Conclusion sketches the debate in a somewhat broader context.[31]

---

18. *See infra* Part II.
19. *See infra* Part III.
20. *See infra* Part IV.
21. *See infra* Part IV.
22. *See infra* Part IV.
23. *See infra* Part V.
24. *See infra* Part V.
25. *See infra* Part V.
26. *See infra* Part V.
27. *See infra* Part V.
28. *See infra* Part V.
29. *See infra* Part V.
30. *See infra* Part VI.
31. *See infra* Part VII.

II. SOME BASIC CASE LAW AND COMMENTARY ON JUDICIAL REVIEW

References to the most famous authoritative statements on judicial review can set the stage for reacting to the claims of judicial review's defenders and critics. Certainly one such statement is that of Alexander Hamilton in *Federalist No. 78*.[32] Hamilton argues that what he refers to as "a limited constitution," with effective restrictions on the scope of congressional legislative power, requires "the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[33]

The celebrated case of *Marbury v. Madison*[34] is the central judicial text on judicial review, even though much of the argument begs crucial questions regarding disputes among branches as to what the Constitution requires.[35] Thomas M. Cooley conveys a sense of *Marbury*'s question-begging by recognizing that "in declaring a law unconstitutional, a court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law . . . ."[36] It is not as though the legislature must merely adopt a bill without assessing its constitutionality, so the view of the reviewing court on the statute's constitutionality need not therefore be exclusive or uncontested.

Famously, though, *Marbury* declares that "[i]t is emphatically the province and duty of the judicial department to say what

---

32. THE FEDERALIST NO. 78, at 379 (Alexander Hamilton) (Terrence Ball ed. 2003).

33. *Id.* This language should not be regarded as entirely settling the question of whether the Framers intended judicial review, a question that "has often been asked and often answered, though not with entire conclusiveness as to the answering." EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 1 (Peter Smith Pub. Inc. 1957) (1938).

34. 5 U.S. (1 Cranch) 137 (1803).

35. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 101, 107 (Walter Carrington 8th ed. 1927) (1868).

36. *Id.* at 334.

the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[37] After a gap of half a century,[38] the Court again exercised the power of judicial review, infamously, in the fugitive slave case, *Dred Scott v. Sandford*.[39] However, probably the best-known discussion of judicial review after *Dred Scott*, the case of *Cooper v. Aaron*,[40] bears a directly opposite substantive political valence and underlying value message.[41]

The *Cooper* Court cited *Marbury* for "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."[42] Yet, *Cooper* engaged in its own question-begging, however, otherwise justified the end. Thus, *Cooper* declared that "no state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."[43] The Court offered little beyond *Marbury* and plati-

---

37. *Marbury*, 5 U.S. at 177. The *Marbury* Court, fully appreciating that Congress, too, takes an oath to uphold the Constitution, seems here to rely more on a "formalist" or a "naturalist" logic as distinct from a concern for well-functioning power symmetry between branches or pragmatic balance of powers concerns. Nor does the Court here much explain any supposed judicial advantage over the legislature with respect to "facial" as distinct from "as-applied" constitutional challenges. For examples of some of the relevant commentary on *Marbury*, see Sanford Levinson, *Why I Still Won't Teach* Marbury *(Except in a Seminar)*, 6 U. PA. J. CONST. L. 588 (2004); Robert F. Nagel, Marbury v. Madison *and Modern Judicial Review*, 38 WAKE FOREST L. REV. 613 (2003); William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

38. *See* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 3 (2005).

39. 60 U.S. 393 (1857). Professor Rubenfeld notes that after *Dred Scott* and the Civil War, "[T]he justices were too busy cutting back on the rights and powers created by the Fourteenth Amendment—that is, too busy vindicating *old* constitutional understandings—to impose on the nation radically new ones." RUBENFELD, *supra* note 38, at 4.

40. 358 U.S. 1 (1958) (per curiam) (noting that the state legislature and governor are legally bound by the Supreme Court's interpretation of the Equal Protection Clause in the public school desegregation context).

41. *See id.*

42. *Id.* at 18 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

43. *Id.*

tude to support its apparent identification of the Constitution itself with the meaning that the Court ultimately ascribed to it.[44]

In a later case, *Baker v. Carr*,[45] the Court declared, without much elaboration, that deciding whether another federal branch has exceeded "whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[46] More recently, the Court has reiterated that "the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."[47] The Court's defense of judicial review continues, however, to partake indirectly of an unnecessarily question-begging approach. For example, the Court argues that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[48] This formulation seems to assume that for Congress to disagree with a Supreme Court constitutional holding is for Congress to "alter" the Constitution itself, or at least the Constitution as most authoritatively interpreted.

More importantly, though, a parallel argument is apparent with regard to the Court itself. Following the Court's own logic, why could one not say, that if the Supreme Court could define its

---

44. *See id.* at 19 (asserting that the mandates of a state governor on a constitutional issue were not merely contradicted by the conflicting constitutional judgment of the Supreme Court but rather by the mandates of the Constitution itself).

45. 369 U.S. 186 (1962).

46. *Id.* at 211. For brief interpretations of *Cooper v. Aaron* and of *Baker v. Carr* by a distinguished interpreter of other sorts of texts, see JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION 73 (2004). *See also id.* at 74 (noting that "the continuing scholarly controversy about 'judicial review' and its limits, especially during the twentieth century, has disclosed how much ambiguity there still is, even after Marbury"). For further discussion, but of a crucially question-begging nature, see *Powell v. McCormack*, 395 U.S. 486, 548–49 & 548 n.86 (1969). The *Powell* Court notes that "federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 549.

47. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

48. *Id.* at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

own powers by altering Article III's meaning, the Constitution would cease to be "superior paramount law, unchangeable by ordinary means . . ."?[49] Could the Supreme Court not possibly alter the meaning of Article III, and thus its own powers, even if it wanted to? Are these cases of congressional and Supreme Court interpretation of the Constitution perhaps really then parallel, at least as far as the Court's own argument goes?

The leading Supreme Court opinions, cited above, give a general idea of the Court's own understanding of the legitimate scope of judicial review. Understandably, those opinions do not give much of a sense of the broad range of possible forms of judicial review or of the substantive arguments for and against judicial review. For even a modest sense of some the possible alternatives, one must turn to the theorists and to international practice.

III. SOME FORMS OF JUDICIAL REVIEW AND JUDICIAL SUPREMACY

Judicial review comes in several varieties. For instance, judicial review in a generic sense may include arrangements referred to as judicial supremacy. Judicial supremacy is, however, sometimes distinguished from mere judicial review. The definitions of both may vary at least slightly, and even the basic terminology is not entirely uniform. For the purposes of this article, however, neither precision nor exhaustiveness is essential.

For a sense of some of the possibilities, one may turn to a classic treatise by the well-recognized theorist, Edward S. Corwin.[50] Corwin's work refers to three separate understandings of the effect of Supreme Court pronouncements on a constitutional question.[51] Corwin's own words best express these ideas:

> First, there is the theory that a pronouncement by the Court of 'unconstitutionality' upon an act of Congress merely settles the law of the case in connection with which the pronouncement was made,

---

49. *Id.* (quoting *Marbury*, 5 U.S. at 177). For a discussion, see Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998).

50. EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (Peter Smith Pub. Inc. 1957) (1938).

51. *See id.* at 2.

> and of such future cases as the Court may choose to apply it on the strength of the doctrine of *stare decisis*. Secondly, there is the theory that such a pronouncement further operates, unless reversed, to strike the condemned statute from the statute book. Lastly, there is the view that such a pronouncement also fixes the meaning of the Constitution *against the President and Congress* unless either the Court reverses itself on ground of 'error' or the Constitution is amended on the point involved.[52]

Corwin's first theory may be a nod toward some lesser degree of Supreme Court control of constitutional meaning than does Corwin's third theory. Even the third theory is open to a range of readings, but it seems to suggest a strong form of judicial review or some form of judicial supremacy.

Professor James Fleming has more recently offered a more specific and carefully-delineated typology of approaches to popular rule and judicial review.[53] Professor Fleming's schema distinguishes five such approaches. These approaches, somewhat reformulated, consist of: (1) a populism, or popular self-government, that rejects even the underlying constitutional limits on popular self-government, let alone judicial enforcement of those constitutional limits;[54] (2) populism that accepts some constitutional limits, but not judicial enforcement of those constitutional limits, on popular rule; [55] (3) judicial review, but not judicial supremacy, in the sense that constitutional authority is shared among the courts, the executive and legislative branches—departmentalism—and ultimately with the people—populism; [56] (4) departmentalism or the sharing of constitutional interpretive authority among the judicial,

---

52. *Id.* at 2–3.

53. *See* James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1378–80 (2005).

54. *See id.* at 1378–79. For an example of the more minimalist end of the judicial review spectrum, see RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994), in which the author reposed little faith in even shared or departmentalized constitutional authority, let alone general judicial supremacy in such matters.

55. *See* Fleming, *supra* note 53, at 1378–79.

56. *See id.*

executive, and legislative branches that thereby rejects judicial supremacy but does not embrace populism;[57] and (5) endorsement of judicial supremacy in some form, even if partly in response to popular political movements.[58]

All of Fleming's terms have somewhat different scope and references. In general, the weakest forms of judicial review somehow leave ultimate constitutional authority to other branches, with the courts merely formally highlighting a constitutional problem or even declaring a statute unconstitutional but subject to some form of legislative override or reaffirmation.[59] Departmentalism, as a type of judicial review, is generally thought to come in two forms.[60] The first form entails each branch having a "defensive" ultimate authority over the constitutionality of actions taken by either of the other two branches and affecting that branch.[61] The second form of departmentalism involves a broader right or mandate of each branch to follow its own best constitutional judgment, despite any contrary judgments expressed by another branch.[62]

Either form of departmentalist judicial review falls short of judicial supremacy, in the sense of some sort of judicial monopoly, when testing the power to authoritatively resolve conflicting interpretations of the Constitution.[63] Even the idea of judicial supremacy can be further classified in several ways. For example, Professor Daniel Farber has further distinguished among levels of judi-

---

57. *See id.* For extended discussion of the departmentalism versus judicial supremacy distinction, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 1–27 (2007). Professor Whittington argues that judicial supremacy has been adopted in part because other political branches derive political benefit therefrom. *Id.* at 27; *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 173 (1999) (noting that "[p]olitical leaders often find judicial review a convenient way to hand off hard decisions to someone else").

58. *See* Fleming, *supra* note 53, at 1379–80.

59. For a brief, informal treatment by a leading scholar, see Jeremy Waldron, *On Judicial Review: Laurence H. Tribe, Jeremy Waldron, and Mark Tushnet Debate*, DISSENT, Summer 2005, at 83, 85.

60. *See* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2781 (2003).

61. *See id.*

62. *See id.*

63. *See, e.g.*, SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 40 (1993).

cial supremacy in ascending order of strength, what he terms: decisional supremacy, anticipatory supremacy, and precedential supremacy.[64] These notions refer, respectively, to judicial power to issue orders binding on other branches in a constitutional case,[65] judicial power to bind through precedent prior to the issuing of a court order,[66] and judicial power to bind through precedent even when no binding court order is obtainable, as when a certain matter is somehow unreviewable.[67]

One certainly might endorse some weaker form of judicial review, while stopping short of endorsing one or more forms of judicial supremacy. Walter Murphy, for example, defends departmentalism in the following terms:

> If a single institution could not only determine the scope of its own authority, that of the other branches of government, and the legitimacy of all public policies, but also definitively define the very essence of constitutional democracy, the polity would be in danger. Vesting responsibility for constitutional interpretation among several institutions competing for power substantially lowers danger of rule by a special interpretive elite, although it increases the messiness of politics.[68]

---

64. Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 359 (2003).

65. *See id.*

66. *See id.*

67. *See id.* For a more general typology of weaker and stronger systems of partial judicial review, see Walter Sinnott-Armstrong, *Weak and Strong Judicial Review*, 22 L. & PHIL. 381 (2003). The author discusses "compound" systems which sometimes, but not always, allow a legislature's statutory override of a contrary constitutional decision by a court. *Id.* at 384.

68. WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 470–71 (2007); *see also* at least under one possible interpretation, LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 118, 125 (Irving Dillard ed., 1959) (arguing that in exchange for judicial independence, courts "should not have the last word in those basic conflicts of 'right and wrong—between whose endless jar justice resides'" (quoting WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 1, sc. 3);

Of course, departmentalism is not without its own theoretical difficulties. Most obviously, departmentalism cannot itself establish the proper boundaries between any two of the federal branches. In the absence of some single final arbiter of such matters—whether the Supreme Court or not—the proper bounds of departmental authority must remain contestable and unresolved. What one branch may perceive as an incursion by another branch may appear to that other branch to be a legitimate exercise of its constitutionally-designated authority.

These basic distinctions do not begin to exhaust the interesting forms of judicial review and its absence. Among the best-known further permutations is John Hart Ely's process-based judicial review, a theory "that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack."[69] As a matter of comparative constitutional law, there is also a range of international possibilities, including systems with no or variously limited judicial review.[70]

Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 82 GEO. L.J. 217, 225 (1994) (endorsing departmentalism as distinct from judicial supremacy); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 890 (2003) (noting that "[m]uch of the recent attack on judicial review is really an effort to undermine judicial supremacy")),

69. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980). On such a theory, one is left to hope that violation of one's most intense substantive constitutional preferences will correlate with some sufficiently severe defect in procedure or fair political representation. For a classic response to Ely, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

70. For discussions of some leading approaches internationally, see, for example, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 124–25 (2006) (noting that "certainly there are some admirable countries, the Netherlands for example, that have maintained a polity that is congruent with the values of our Preamble without engaging in judicial review"); *see also* Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 O.J.L.S 275 (2002) (considering some complications of the claim that some countries with zero or limited non-rights-focused judicial review may often protect rights as well or better than countries with some more substantial form of judicial review); Mark Tushnet, *Democracy Versus Judicial Review: Is It Time*

There is certainly no consensus that any of the forms of judicial review or no judicial review at all better protects fundamental rights.[71] More broadly, it is fair to raise the possibility that there may not be any interesting correlations between any typically-held set of basic substantive moral and political views on the one hand and any particular system of judicial review or its absence on the other. This discussion certainly need not adopt any such position. There may be actual causal links, running in either direction, between systems of judicial review and substantive moral values. Either an initial adoption of judicial review promotes adoption of particular substantive values, or a commitment to particular substantive values leads one to tend to endorse or reject judicial review.

In any case, one should not expect to see the judicial review tail wagging the dog. Most of the recognized value or disvalue in any system of judicial review will be in its perceived distinctive substantive payoffs over a given time period. Even if a prior choice of a system of judicial review always leads one to adopt particular substantive moral and political values,[72] those latter values will likely be crucial, and rightly so, in justifying the chosen system of judicial review. Given serious conflicts between one's approach to judicial review and one's basic moral and political

---

to Amend the Constitution?, DISSENT, Spring 2005, at 59, 60 (noting the absence of generalized judicial review in the Netherlands, "a country not noted for widespread violations of civil liberties" and the possibility of a legislative override of a judicial declaration of unconstitutionality by two thirds or even by bare majority vote); Mark Tushnet, *Alternative Forms of Judicial Review,* 101 MICH. L. REV. 2781, 2783–87 (2003) (contrasting in particular Germany, Canada, Britain, and New Zealand on the possible forms of judicial review); Jeremy Waldron, *On Judicial Review: Laurence H. Tribe, Jeremy Waldron, and Mark Tushnet Debate*, DISSENT, Spring 2005, at 83, 85 (noting the nuanced possibilities of limited judicial review in Britain and implicitly recognizing thereby the almost infinite gradation of logical possibilities for judicial review generally).

71. *See generally* sources cited *supra* note 70.

72. That is, one need not regard theories of judicial review as what are called mere epiphenomena. Adopting some such theory might affect one's substantive moral and political beliefs. In cases of conflict, one should expect the latter basic or primary substantive beliefs to outweigh one's commitment to the former. Also, theories of judicial review are and should be evaluated by a person mainly in accordance with how well or poorly they promote his most basic and otherwise best defended substantive moral and political value commitments.

values, the latter will usually predominate.[73] Many may be unwilling to tolerate unnecessary loss of substantive moral and political values for the sake of preserving a given form of judicial review.[74] When one's approach to judicial review and one's substantive moral and political values are more compatible, those substantive values will typically be most important.

IV. THE QUESTION OF JUDICIAL REVIEW AS A DISTRACTION: AN EXAMPLE AND THE BROADER CONTEXT

The potential for distraction among theories of judicial review is illustrated by an interesting and widely noted collection of short papers by Rev. Richard John Neuhaus,[75] Robert H. Bork,[76] Russell Hittinger,[77] Hadley Arkes,[78] Charles W. Colson,[79] and Robert P. George.[80] The collection of papers clearly makes numerous explicit references to matters of democracy, the separation of powers, theories of constitutional interpretation, and most notably to judicial review and judicial supremacy. Thus, there are declarations, for example, of the existence of "an entrenched pattern of government by judges that is nothing less than the usurpation of

---

73. This does not mean, however, that we should be quick to abandon our approaches to judicial review if it appears that they will not pay off in substantive value terms over some chosen time frame. The future may, in various respects, not work out as we expect. Even past constitutional decisions may not have the continuing consequences we expect. The unanticipated risks and costs of any change in our system of judicial review may be dramatic. For general background, see DAVID HUME, *Essay Twenty-Three* to *Twenty-Six*, *in* POLITICAL ESSAYS 186–220 (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1752).

74. We hold open the possibility that some may endorse or reject judicial review based more on its past accomplishments, or its past perceived abuses, over some salient period—perhaps the past generation—than on its predicted effects over the next generation.

75. Rev. Richard John Neuhaus, *Introduction* to *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996, at 1.

76. Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS, Nov. 1996, at 21.

77. Russell Hittinger, *A Crisis of Legitimacy*, FIRST THINGS, Nov. 1996, at 25.

78. Hadley Arkes, *A Culture Corrupted*, FIRST THINGS, Nov. 1996, at 30.

79. Charles W. Colson, *Kingdoms in Conflict*, FIRST THINGS, Nov. 1996, at 34.

80. Robert P. George, *The Tyrant State*, FIRST THINGS, Nov. 1996, at 39.

politics."[81] Theorists often note that, "[a]gain and again, questions that are properly political are legalized, and even speciously constitutionalized."[82] There is a broader argument that "generations of Americans have accorded all courts, and most especially the Supreme Court, unchecked power."[83] More dramatically, theorists also contend that, "The Justices are our masters in a way that no President, Congressman, governor, or other elected official is."[84]

In this sense, the focus of the papers in this collection is clearly on allegations of judicial usurpation and judicial supremacy and thus squarely on the broader notion of the proper scope of judicial review. Still, the idea of a genuine focus on judicial review begins to fade when one notices that the authors' grievances expand into allegedly insufficient judicial respect for particular methods of the judicial resolution of cases, even for methods of interpreting the Constitution, such as originalism[85] and textualism.[86] While the idea of the Court's departing from methods of originalism and textualism could certainly be directly related to claims of judicial usurpation, there is at least some distinction to be drawn between methods by which the Court should interpret the Constitution and whether or how dramatically the Court should have the last word, however arrived at, in constitutional matters.

A fair reading of the essays in this symposium suggests that much of the real motivating force and the overriding concern lie elsewhere, in matters of moral and political substance. Toward the beginning of his essay, for example, Robert Bork focuses not on usurpation, or process, but on substance. In just the preceding Court term, Bork argues that

> [t]he Court moved a long way toward making homosexual conduct a constitutional right, adopted the radical feminist view that men and women are essentially identical, continued to view the First Amendment as a protection of self-gratification rather than of the free articulation of ideas, and

81. *See* Neuhaus, *supra* note 75, at 1.
82. *Id.*
83. Bork, *supra* note 76, at 23.
84. *Id.*; *see also* Hittinger, *supra* note 77, at 26.
85. *See* Bork, *supra* note 76, at 22.
86. *See* Hittinger, *supra* note 77, at 27.

> overturned two hundred years of history to hold that political patronage is unconstitutional.[87]

In the context of contemporary law and politics, it is difficult to believe that Professor Bork objects to the above outcomes only, or even mostly, insofar as they are the product of an allegedly objectionable process of judicial review. Even the purported judicial overreach, combined with the distinct question of non-textual and non-originalist methods of constitutional interpretation, hardly captures the nature and force of Professor Bork's concern. The broader context suggests that Professor Bork and his fellow contributors are more compellingly motivated by what they take to be the substantive moral or legal wrongness of these and other legal outcomes, however arrived at.

The focus of these authors' concerns is clearly on predictable substantive issues, centering around abortion, euthanasia, and gay marriage or gay rights more generally.[88] Cases raising these issues will, as the authors recognize, affect other substantive values of the law and culture as well.[89] Yet, the crucial attention is really on substantive normative concerns,[90] rather than on the proper scope and limits of judicial review.

It is also important to appreciate that even the institutional focus of these authors is not entirely on the courts.[91] Even when the courts are directly involved, the real concern, according to these authors, is that "[t]he courts, sometimes abetted by, and almost always acquiesced in [by] federal and state executives and legislators, have imposed upon the nation immoral policies that pro-life Americans cannot, in conscience, accept."[92] In such cases, it is ordinarily the substantive policies that are thought to be crucially moral or immoral, and thus, the policies drive the political and institutional arguments, as opposed to typically less pressing issues of one form of judicial review over another.[93] Despite the

---

87. Bork, *supra* note 76, at 21.

88. *See, e.g.*, Arkes, *supra* note 78, at 31; Colson, *supra* note 79, at 37.

89. *See* Hittinger, *supra* note 77, at 28.

90. *See, e.g.*, George, *supra* note 80, at 40 (referring to "people's fundamental rights").

91. *See* George, *supra* note 80, at 40, 44.

92. *Id.* at 44.

93. *See id.* at 40–44; Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 582–83 (2003).

obvious surge of academic interest in judicial review and its possible abandonment, this should not surprise anyone.

This article does not suggest that it is unreasonable for people interested in public policy to stake out some position for or against some form of judicial review. At the same time, it is fair to say that wherever a person stands on the political spectrum, it is also reasonable to find the historical record of the Supreme Court to be, from that political perspective, profoundly mixed. One can examine historic Supreme Court decisions and find a broad range of more or less progressive, liberal, or egalitarian results from various historical periods.[94] It is likewise plain that one can also

---

94. By way merely of example, consider: Roper v. Simmons, 543 U.S. 551 (2005) (making juvenile death penalty unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (overturning anti-sodomy statute); Grutter v. Bollinger, 539 U.S. 306 (2003) (considering affirmative action in law school admissions); Atkins v. Virginia, 536 U.S. 304 (2002) (making death penalty for low I.Q. defendants unconstitutional); Stenberg v. Carhart, 530 U.S. 914 (2000) (outlining constitutionality of late term abortion procedures); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prohibiting student-chosen prayer at game); Saenz v. Roe, 526 U.S. 489 (1999) (outlining scope of Fourteenth Amendment Privileges and Immunities Clause); Reno v. ACLU, 521 U.S. 844 (1997) (setting limits on shielding minors from speech on Internet); United States v. Virginia, 518 U.S. 515 (1996) (banning sex discrimination in public schooling); Lee v. Weisman, 505 U.S. 577 (1992) (limiting religious invocation at public school under the Establishment Clause); United States v. Eichman, 496 U.S. 310 (1990) (asserting flag burning speech rights despite congressional statute); Texas v. Johnson, 491 U.S. 397 (1989) (considering flag burning); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (limiting recovery for torts under free speech); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (barring speech content-based sales tax); Batson v. Kentucky, 476 U.S. 79 (1986) (holding racial bias in peremptory challenges unconstitutional); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (outlining meaningful equal protection standard for mental disability); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (limiting liability based on association with a group; limiting liability to the members who actually caused the damage); Plyler v. Doe, 457 U.S. 202 (1982) (upholding educational rights of aliens); Stone v. Graham, 449 U.S. 39 (1980) (addressing Ten Commandments classroom plaque); Branti v. Finkel, 445 U.S. 507 (1980) (limiting patronage); Zablocki v. Redhail, 434 U.S. 374 (1978) (upholding right to marry); Wooley v. Maynard, 430 U.S. 705 (1977) (considering compelled speech); Elrod v. Burns, 427 U.S. 347 (1976) (limiting patronage where it constrains freedoms of belief and association); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (defining a constitutional limitation on alien access to civil service work); Kahn v. Shevin, 416 U.S. 351

(1974) (allowing property tax exemption for widows); Sugarman v. Dougall, 413 U.S. 634 (1973) (exploring state civil service work for aliens); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (barring federal benefit discrimination against non-traditional families); Miller v. California, 413 U.S. 15 (1973) (creating a rigorous obscenity test); Roe v. Wade, 410 U.S. 113 (1973) (limiting state restrictions on abortion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (considering free exercise rights and education); Eisenstadt v. Baird, 405 U.S. 438 (1972) (allowing non-marital contraceptives); Reed v. Reed, 404 U.S. 71 (1971) (proscribing arbitrary sex discrimination); Graham v. Richardson, 403 U.S. 365 (1971) (refining the eligibility for state welfare benefits and the constitutional treatment of alienage); Cohen v. California, 403 U.S. 15 (1971) (protecting "emotional" speech meaning); Boddie v. Connecticut, 401 U.S. 371 (1971) (lifting filing fee barrier to divorce); Goldberg v. Kelly, 397 U.S. 254 (1970) (asserting welfare due process rights); Brandenburg v. Ohio, 395 U.S. 444 (1969) (creating a speech-protective test for subversive advocacy); Shapiro v. Thompson, 394 U.S. 618 (1969) (barring welfare discrimination against new state entrants); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (creating student speech protection test); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating most of the Bill of Rights); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (protecting the rights of non-marital children); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (fixing speech rights of public employees); Levy v. Louisiana, 391 U.S. 68 (1968) (protecting rights of non-marital children); Loving v. Virginia, 388 U.S. 1 (1967) (protecting right to interracial marriage); *In re* Gault, 387 U.S. 1 (1967) (instituting due process for juveniles); Miranda v. Arizona, 384 U.S. 436 (1966) (creating right to warning/explanation of rights of arrestee); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (holding discriminatory state poll tax unconstitutional); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing right to use contraceptives); Aptheker v. Sec'y of State, 378 U.S. 500 (1964) (proscribing overbroad limits on travel); N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (setting free speech limits on libel recovery); Gideon v. Wainwright, 372 U.S. 335 (1963) (asserting right to appointed criminal counsel); Engel v. Vitale, 370 U.S. 421 (1962) (limiting school prayer under the Establishment Clause); Baker v. Carr, 369 U.S. 186 (1962) (limiting state legislative reapportionment); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (expanding the definition of entanglement and state action); Talley v. California, 362 U.S. 60 (1960) (upholding right to anonymous speech); Cooper v. Aaron, 358 U.S. 1 (1958) (subjecting state officials to Supreme Court constitutional interpretation); Kent v. Dulles, 357 U.S. 116 (1958) (stressing the importance of travel rights); Bolling v. Sharpe, 347 U.S. 497 (1954) (requiring District of Columbia school desegregation); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (ordering state-level public school desegregation); Butler v. Michigan, 352 U.S. 380 (1952) (holding that adult speech rights are not limited to children's speech rights); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (limiting President's war and executive powers); Terminiello v. City of Chicago, 337 U.S. 1 (1949) (protecting provocative speech);

find an equally broad range of significant cases of an opposite political valence, sometimes finding an obvious "paired" or counterpart case, opposing each other across various periods of constitutional history.[95]

Shelley v. Kraemer, 334 U.S. 1 (1948) (broadening racial state action); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (exploring public education and the Pledge of Allegiance); Skinner v. Oklahoma, 316 U.S. 535 (1942) (foreshadowing privacy-oriented substantive due process cases); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state intervention in employment markets); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (banning ethnic and racial discrimination).

95. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007) (finding de facto racial balances in schools not a compelling government interest); Morse v. Frederick, 127 S. Ct. 2618 (2007) (further limiting *Tinker* speech rights); Gonzales v. Carhart, 550 U.S. 124 (2007) (restricting late-term abortion); Garcetti v. Ceballos, 547 U.S. 410 (2006) (limiting public employee speech rights; academic speech rights left unaddressed); Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (compelling university speech regarding military recruiting); Gratz v. Bollinger, 539 U.S. 244 (2003) (holding affirmative action by university not narrowly tailored); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (limiting suits by disabled persons against state employer); Bush v. Gore, 531 U.S. 98 (2000) (deciding Bush-Gore Florida recount); United States v. Morrison, 529 U.S. 598 (2000) (holding gender violence statute outside Congress's commerce power); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (limiting enforcement of age discrimination statute against states); Vacco v. Quill, 521 U.S. 793 (1997) (finding no fundamental right to assisted suicide); Washington v. Glucksberg, 521 U.S. 702 (1997) (finding no fundamental right to assisted suicide); City of Boerne v. Flores, 521 U.S. 507 (1997) (limiting congressional power to aggressively enforce Fourteenth Amendment rights); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (ordering strict scrutiny of all racial affirmative action); Rust v. Sullivan, 500 U.S. 173 (1991) (limiting federally-funded abortion information); Deshaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989) (recognizing limited scope of non-custodial "positive" rights); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (limiting scope of *Tinker* speech protection); Turner v. Safley, 482 U.S. 78 (1987) (holding minimum scrutiny of prisoners' constitutional rights); McCleskey v. Kemp, 481 U.S. 279 (1987) (noting racial disparities in death penalty); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state prohibition of consensual sodomy); Allen v. Wright, 468 U.S. 737 (1984) (setting restrictive limits on standing); Connick v. Myers, 461 U.S. 138 (1983) (limiting speech rights of public employees); Haig v. Agee, 453 U.S. 280 (1981) (upholding passport revocation on national security grounds); Snepp v. United States, 444 U.S. 507 (1980) (upholding preclearance review for unclassified material in CIA agent's book); Ambach v. Nor-

Thus, as much today as thirty years ago,

> Every lawyer thinks that the Supreme Court has gone wrong, even violently wrong, at some point in its career. If he does not hate the conservative decisions of the early 1930s, which threatened to block the New Deal, he is likely to hate the liberal decisions of the [1960s and 1970s].[96]

---

wick, 441 U.S. 68 (1979) (upholding state limits on aliens as teachers); FCC v. Pacifica Found., 438 U.S. 726 (1978) (creating a near mirror-image of *Cohen v. California*, 403 U.S. 15 (1971)); Maher v. Roe, 432 U.S. 464 (1977) (denying abortion subsidies); Geduldig v. Aiello, 417 U.S. 484 (1974) (excluding pregnancy disability as not gender-based); Saxbe v. Washington Post, Co., 417 U.S. 843 (1974) (limiting rights of press and prisoners); Pell v. Procunier, 417 U.S. 817 (1974) (limiting rights of press and prisoners); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding no federal constitutional right to education; minimum scrutiny for wealth/poverty); Furman v. Georgia, 408 U.S. 238 (1972) (considering death penalty); Lindsey v. Normet, 405 U.S. 56 (1972) (apparently denying constitutional minimal housing right); Dandridge v. Williams, 397 U.S. 471 (1970) (limiting welfare rights under Equal Protection Clause); Zemel v. Rusk, 381 U.S. 1 (1965) (restricting travel to Cuba); Dennis v. United States, 341 U.S. 494 (1951) (taking a broad view of clear and present danger); Korematsu v. United States, 323 U.S. 214 (1944) (allowing wartime ancestry-based detention); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding unconstitutional to require student to salute flag), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Buck v. Bell, 274 U.S. 200 (1927) (upholding state sterilization law and noting "[t]hree generations of imbeciles are enough"); Abrams v. United States, 250 U.S. 616 (1919) (creating a restrictive clear and present danger test); Debs v. United States, 249 U.S. 211 (1919) (limiting political speech rights); Schenk v. United States, 249 U.S. 47 (1919) (limiting political speech protection); Lochner v. New York, 198 U.S. 45 (1905) (limiting state intervention in labor markets); Plessy v. Ferguson, 163 U.S. 537 (1896) (maintaining racial "separate but equal" education); Chae Ching Ping v. United States (*Chinese Exclusion Cases*), 130 U.S. 581 (1889) (excluding alien workers permissible despite treaty); The Civil Rights Cases, 109 U.S. 3 (1883) (taking a restrictive view of Fourteenth Amendment state action); Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding gender-based denial of occupation of attorney); Slaughter-House Cases, 83 U.S. 36 (1872) (minimizing Fourteenth Amendment Privileges and Immunities Clause); Dred Scott v. Sandford, 60 U.S. 393 (1856) (denying slaves citizenship and holding no congressional power to limit vested property rights in slaves).

96. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 148 (1977).

It is easy to imagine persons of any recognizable political persuasion being ambivalent toward judicial review, on whatever subjects are of greatest personal and political concern. To either endorse or reject judicial review may seem to write off many personally disturbing outcomes on important matters over the span of American constitutional history.

This "mixed" or ambivalent view is not the only reasonable view. Some people, given their established substantive value commitments, may think well, and others less favorably, of one or more forms of judicial review. More importantly, even if one finds the historical track record of judicial review decidedly mixed, there is no guarantee that such a pattern will endure into the future periods of time about which one most particularly cares. The next decade or quarter of a century of judicial review may, from any given political perspective, prove to be either an abomination or a golden age.

V. WHY MIGHT JUDICIAL REVIEW INDEPENDENTLY MATTER?

It is not difficult to think of possible reasons to attach independent moral weight to some form of judicial review or its absence. Typically, though, the problem is that it proves equally easy to impeach, minimize, or bypass the possible arguments in some plausible way. The moral and political values of particular results, whether reached with or without judicial review, tend to outweigh the net results of such arguments ultimately.

Not everyone has been persuaded that the institution of judicial review has provided much of a difference, one way or another. Mark Tushnet, one of the leading progressive students of judicial review, has concluded that "judicial review has been basically 'noise around zero,' a sort of random disruption of the results achieved in the fora of nonjudicial politics."[97] Again, one can reasonably reject this view, for some or all of the historical past and even more clearly over any selected future period. Theorists have covered a range of similar possible positions. Indeed, some thoughtful writers have exercised restraint in their assessment of the overall value or disvalue of judicial review. Thus, the philosopher Peter Railton has concluded "the contribution of judicial re-

97. Mark Tushnet, *Politics, National Identity, and the Thin Constitution*, 34 U. RICH. L. REV. 545, 550 (2000).

view to basic rights—or to liberal-democratic values generally—has been on balance either slight or negative."[98] Professor Railton reasoned that any positive results in particular cases of judicial review must be balanced against the costs of judicial review in terms of loss of popular sovereignty, political equality, and democracy.[99] Following the work of Gerald Rosenberg,[100] writers, for example Professor Tushnet,[101] have doubted whether even the touted successes of judicial review have had as much favorable impact in actual lived practice as is sometimes believed.[102]

A. Judicial Review and Judicial Independence

The result that one reaches on the distinctive value of judicial review should account for the specific purported virtues and vices of judicial review. For example, it is often thought that Supreme Court Justices in particular, tend to enjoy, even more than other legal decision-makers, some desirable form of "independence." In turn, presumptively this independence leads to desirable judicial decisions.

Stated affirmatively, the general idea is that "[j]udges are more independent and more value-free than members of the political branches."[103] With less assurance, judges "set themselves at some distance from everyday politics; their special standing in a democracy requires a certain detachment and thoughtfulness."[104] In the same vein, "Supreme Court justices [sic] are especially free to exercise their judgment untainted by avarice or personal ambi-

---

98. Peter Railton, *Judicial Review, Elites, and Liberal Democracy*, *in* NOMOS XXV: LIBERAL DEMOCRACY 153, 167 (J. Roland Pennock & John W. Chapman eds., 1983).

99. *See id.*

100. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

101. *See* Tushnet, *supra* note 97; at fullest length, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

102. For a response to Professor Tushnet's use of Professor Rosenberg's argument, see Erwin Chemerinsky, *Losing Faith?: America Without Judicial Review*, 98 MICH. L. REV. 1416, 1416, 1427–28 (2000).

103. Robert McKay, *Judicial Review in a Liberal Democracy*, *in* NOMOS XXV: LIBERAL DEMOCRACY 121, 138–39 (J. Roland Pennock & John W. Chapman eds., 1983).

104. Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 388 (1981).

tion."[105] A more skeptical leading critic of judicial review, Jeremy Waldron, has observed that "[t]he thought seems to be that the courts, with their wigs and ceremonies, heir leather bound volumes, and their relative insulation from party politics"[106] are, on that doubtful basis, more to be trusted with basic civil and human rights than are legislatures.[107]

There is certainly some dispute, or at least a difference in emphasis, among careful observers on the reality of meaningful independence of federal judges, as distinguished from other governmental officials. Seemingly, independence is presumed by what is referred to as the attitudinal model of judicial decision-making. The attitudinal model is said to hold "that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."[108] Yet, whether the Justices' attitudes and values, including possible shifts therein, reflect judicial independence is an open question.

Thus, some argue that Supreme Court Justices, along with federal judges more generally, are influenced in various ways by the mass media,[109] by selected social groups,[110] and by the legal pro-

---

105. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 58 (2001); *see also id.* at 59 ("Judges are . . . disinterested.").

106. JEREMY WALDRON, THE DIGNITY OF LEGISLATION 5 (1999). For a response emphasizing the partisan political insulation and competence screening of federal judges, see Richard A. Posner, *Review of Jeremy Waldron, Law and Disagreement*, 100 COLUM. L. REV. 582, 591 (2000).

107. *See* WALDRON, *supra* note 106, at 5. For recent statements of Professor Waldron's views, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); WALDRON, *Law and Disagreement*, *supra* note 1, at 211–312 (1999).

108. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002). For some attitudes and demographics of federal judges, see Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835 (1998).

109. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 137, 139, 142 (2006).

110. *See id.* at 142, 151 (asserting that "[j]udges want the approval of individuals and groups that are salient to them, and their interest in approval may affect their judicial behavior"). This sort of influence should, however, be distinguished from explicit lobbying. *See also* Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1019, 1022 (2004).

fession,[111] as well as by the broader public and its anticipated reactions.[112] Others argue that even Supreme Court Justices are aware of their institutional context and of the preferences of other actors.[113] Thus, it is certainly reasonable to think of Supreme Court Justices as less than independent from various sorts of external influences, and any attempt to compare the independence of the Justices and of other federal political actors, including tenured civil servants, would be even more contestable. Most crucially, it is unclear to what degree the Supreme Court, even in the modern era,[114] could long be out of step significantly with the President and Congress.[115]

---

111. *See* BAUM, *supra* note 109, at 142.

112. *See id.* at 155 ("[J]ustices worry about the erosion of public support for the Court."). At the extreme, consider, at least for some non-Supreme Court judges, the reactions reported in Mike McKee, *Judges on ABA Panel Describe Living in Fear, Years After Unpopular Rulings*, THE RECORDER, Aug. 13, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1186736531207. Whether less concern for public reaction would count as (desirable) judicial independence is unclear; often the vague idea of judicial independence is left unspecified. *See* Sanford Levinson, *Identifying "Independence,"* 86 B.U. L. REV. 1297, 1297 (2006).

113. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE xiii (1998); *see also* HOWARD GILLMAN & CORNELL W. CLAYTON, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1, 3 (Cornell W. Clayton & Howard Gillman eds., 1999) ("[T]here may be much to be gained by focusing less on the policy preferences of particular justices and more on the distinctive characteristics of the Court as an institution, its relationship to other institutions in the political system, and how both of these might shape judicial values and attitudes."). For discussion of a number of possibly relevant considerations of various sorts, see RICHARD A. POSNER, OVERCOMING LAW 135–44 (1995), in which the author models judicial utility in terms of effort or time devoted; on and off worksite leisure, including delegation; pecuniary income; reputation; voting itself, including the utility derived from adhering to certain constraints on voting; popularity; prestige; and the value of avoiding reversal over time.

114. Consider the Supreme Court's apparent preference for discretion over valor in *Ex Parte McCardle*, 74 U.S. (7 Wall) 506 (1869), in which the Court viewed its own jurisdiction rather modestly, in light of congressional hostility.

115. *See, e.g.*, Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 310 & n.296 (2005) (noting the dependence of the federal courts on the other branches (citing, for example, Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 583–85 (2001))).

B. Judicial Review and Decision on Principle

The idea that the federal courts, and especially the Supreme Court, do, or at least can, decide important matters on the basis not of politics, but of principle, is related to the murky idea of judicial independence.[116] While it is conceivable to begin with a politically neutral understanding of how the Court might decide a matter on "principle,"[117] the "neutral" ideal of "principle" will tend to slide into something more like a well-considered, if not a politically desirable or justifiable, principle.[118]

To defend judicial review as "principled" decision-making, one of course will need to establish that the decision would be less likely to rest on principle if Congress or the President makes it.[119] One problem is that the other branches, like the Court, may act at least partially on principle, in the sense of some allocation of the rights in question. Most of the leading constitutional issues can be expressed at least partially in terms of conflicting visions of rights.[120]

Even if one assumes that the Court may rely more on principle, in this limited sense of a concern for allocating rights, one must still wonder how much this difference between the Court and other branches will be worth. In this sense, "principle" could accord a trumping right to segregationists as well as to desegregationists, to those seeking abortion or gay marriage as well as to those who seek their prohibition, to those favoring as well as op-

---

116. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 58 (2d ed., Yale Univ. Press 1986) (1962); DWORKIN, *supra* note 8, at 70 (1985) ("Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone . . . .").

117. *See* DWORKIN, *supra* note 8, at 69 (distinguishing matters of "principle," or of rights allocation, from matters of "policy," or of how to pursue the general welfare).

118. *See* BICKEL, *supra* note 116, at 58 (noting that "principle" is based on "society's [long-term] spiritual as well as material needs").

119. DWORKIN, *supra* note 8, at 69–70. At a normative level, John Rawls argued that Congress was no less bound than the Supreme Court to justify its output in non-comprehensive public reason terms when matters of basic justice and constitutional essentials are at stake. JOHN RAWLS, POLITICAL LIBERALISM 235 (Columbia Univ. Press expanded ed. 2005).

120. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

posing capital punishment, and to both sides of every issue from gun control to religion in the public schools.[121] Why would the Court's assumed special attention to recognizing or denying rights in such cases, to one side or another, count as a significant practical advantage or disadvantage for judicial review?

At this point in the analysis, there is an expected slide from a federal court's deciding cases merely on principle, or right, to something like deciding cases on the basis of a good, sound, justified principle. It would be significant if one could show the Supreme Court to be either especially good or bad at deciding issues on the basis of a well-justified principle. Yet, both advocates and detractors of judicial review must come to terms with the well-established and continuing track record of the Supreme Court. However one defines a well-justified principle, the Court likely has exhibited an attraction to that principle on many occasions,[122] although it may be unclear whether the Court displays this attraction more or less than other branches do. Unfortunately, the Court has likewise disdained nearly everyone's preferred principle on any number of other important occasions.[123]

Decision-making merely on principle, then, naturally drifts into a concern for decision based on well-justified principles and then into matters of normative moral and political substance. Thus, it remains more defensible that one's theory of judicial review should be a secondary consideration. Furthermore, one's strongest normative preferences on issues of moral and political substance should be the driving force behind these secondary theories.

---

121. A number of these principles can be found on one or both sides of the politically progressive/non-politically progressive divide between the Court's decisions, as already discussed. *See supra* notes 94–95 and accompanying text, depending on one's substantive normative preferences.

122. *See supra* notes 94–95 and accompanying text.

123. Correspondingly, depending upon one's normative preferences, see *supra* note 94 or note 95. The more or less mixed results of judicial review lead naturally to Judge Posner's explicit pragmatism, within which "whether judicial review has been on balance a good thing for America" becomes the key question. Richard A. Posner, *Review of Jeremy Waldron, Law and Disagreement*, 100 COLUM. L. REV. 582, 592 (2000); Waldron, *Judicial Review*, *supra* note 1, at 1405.

C. Judicial Review, Protection of the Powerless, and Democracy

More specifically, people sometimes defend judicial review substantively on the basis of the Court's distinctive protection thereby of the "weak and powerless"[124] or of political minorities.[125] This may or may not reflect the constitutional drafters' intentions.[126] Regardless of the original intent, it is unclear how well any such intention has translated into practice through judicial review, compared to the work of the other branches.[127] The illustrative record referred to above is often thought of as consistently mixed.[128] Given the possibilities of different decisions by Congress and the President had judicial review never been established,[129] the case for or against judicial review based on distinctive protection of any designated set of political minorities becomes even less clear.

Nor does a focus on either the values or limitations of majoritarian democracy provide independent grounds for or against judicial review. It is often thought that judicial review is anti-majoritarian, in the sense of sometimes overturning the results of a democratic political process.[130] This would presumably be a

---

124. Robert B. McKay, *Judicial Review in a Liberal Democracy*, *in* NOMOS XXV: LIBERAL DEMOCRACY 121, 140 (1983).

125. David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 136 (1988).

126. *See id.*

127. For an authoritative voice of skepticism as to the protection of minority rights through judicial review of federal legislation, see the leading scholar, ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989). Here, Dahl questions the Supreme Court's political independence as well as its historic commitment to fundamental rights and interests. *Id.* at 189–90.

128. *See supra* notes 94–95 for contrasts.

129. For background, see JAMES BRADLEY THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, *in* LEGAL ESSAYS 24 (reprint ed. 1972) (1908) (quoting Daniel Webster on legislators as sometimes voting for a dubiously constitutional bill on grounds that judicial review will be available to resolve such matters). For an expression of mixed judgment on this point, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 66 (1983) (1980), in which the author argues the improbability of the counterfactual outcomes. *See also* Perry, *supra* note 6, at 874.

130. The countermajoritarian problem has been raised most famously in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962), and the history and merits of this dispute have been examined, for example, in Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Barry

moral cost of judicial review, to the extent that judicial review involves a loss of valuable democratic functioning.

Many different and indeed opposing approaches to the question of democracy are possible.[131] One of these is to think of democracy more in substantive rather than procedural or electoral terms. Thus, some think of democracy less in terms of majority rule and more as a substantive matter of "the equal freedom and independence"[132] of citizens.[133]

Such approaches link judicial review to presumably good things but actually do little to establish the independent moral importance of judicial review. To say that equal freedom[134] is a good thing is merely to set the stage for familiar ideological debates of

---

Friedman, *The History of the Countermajoritarian Difficulty, Part I: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004). For a sanguine view of the relation between judicial review and deliberative democracy, see Horacio Spector, *Judicial Review, Rights, and Democracy*, 22 L. & PHIL. 285, 286 (2003).

131. For a helpful survey of some basic arguments, see Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974), discussing doubts about the majoritarian or democratic character of much legislation and noting the potential for democratic influences on the Supreme Court. For further nuances, see Dimitrios Kyritsis, *Representation and Waldron's Objection to Judicial Review*, 26 OX. J. LEGAL STUD. 733, 740–41 (2006); Sanford Levinson, *Constitutional Populism: Is It Time For 'We the People' To Demand an Article V Convention?*, 4 WIDENER L. SYMP. J. 211 (1999).

132. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 331 (1990).

133. For arguments similar to that of Freeman, see, for example, EISGRUBER, *supra* note 105, at 58–59; Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006) (arguing for a deontologically-based democratic participatory right to a hearing for purposes of judicial review, but on a logic compatible with systems far weaker than judicial supremacy or strong judicial review); Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 L. & PHIL. 247 (2003) (arguing judicial review as compatible with if not embodying a worthy alternative understanding of participatory democracy).

134. For background, but hardly an exhaustion of the range of ideological possibilities, see the essays in EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES (Stephen Darwall ed., 1995).

the definition of equal freedom[135] or what counts as the most valuable or legitimate kind of equal freedom.[136] This level of debate will largely settle whether judicial review is defined at least partly as a good thing or not. Yet, defining judicial review partly in terms of seeking good things, such as equal freedom and independence, does not change historical or future realities. For most mainstream definitions of equal freedom, it seems clear that judicial review has sometimes promoted and sometimes undermined such a value.[137] This broad pattern may well endure into the future. It is inconceivable that any court could consistently issue decisions that are "neutral" among conceptions of equal freedom or any substantive conception of democracy, let alone faithfully apply such a "neutral" idea in practice.[138]

D. Judicial Review and the Value of Settlement

A more pragmatic approach argues for judicial review as distinctively promoting less glamorous values such as uniformity, finality, or settled resolution in the law. The courts,[139] as well as

---

135. By contrast with several of the essays contained in *id.*, see, for example, FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (paperpack ed. 1978) (1960); LEFT LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2001); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, NORMS OF LIBERTY: A PERFECTIONIST BASIS FOR A NON-PERFECTIONIST POLITICS (2005).

136. *See* Jeremy Waldron, *Freeman's Defense of Judicial Review*, 13 L. & PHIL. 27, 32 (1994).

137. However, we usually conceive of equal freedom and independence, or of any other substantive theory of democracy, the cases from any era noted *supra* notes 94 and 95 will provide examples of at least minimally upholding, as well as of neglecting, any such conception. In Mark Tushnet's concise observation, "we buy judicial review wholesale." MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 141 (1999).

138. Consider, for example, whether it would be possible even in theory to issue an affirmative action decision that was neutral among competing theories of what "equal liberty" meant and required. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny for racially-based affirmative action).

139. Much of the driving force of *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), lies in the perceived need for uniform—and for nationally, as opposed to parochially minded—interpretations of the Commerce Clause. *See also* Glassroth v. Moore, 335 F.3d 1282, 1302–03 (11th Cir. 2003) (holding a state supreme court judge, no less than state governor, bound by final judgment of state or federal court) (citing Cooper v. Aaron, 358 U.S. 1 (1958)).

classic[140] and contemporary[141] commentators, have endorsed this general theme. The idea is that strong judicial review—judicial supremacy, if not weaker forms of judicial review—provides an "ultimacy"[142] in legal argument that is conducive to uniformity or settledness in the law, at least short of constitutional amendment.

This sort of argument, however, is contestable at several points. One might wonder how much settledness and finality the Supreme Court has currently bestowed on the law of, for example, affirmative action, late-term abortions, voting districts, the death penalty, the Establishment Clause, student speech, or commercial speech. Historic examples plainly include a number of instances of the dramatic upsetting of settled precedent.[143] The classic free speech and free exercise case of *West Virginia State Board of Education v. Barnette*[144] explicitly overturned a "settled" Supreme Court decision that was not more than three years old, *Minersville*

---

140. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 130 (Ronald D. Rotunda & John E. Nowak reprint ed. 1987) (1833) (For the sake of conclusiveness and uniformity, "a supreme arbiter or authority" in construing the Constitution is "if not absolutely indispensable, at least, of the highest possible practical utility and importance."); Walter F. Murphy, *Who Shall Interpret? The Quest For the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 407 (1986) (quoting Justice Story).

141. *See, e.g.*, Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 466 (2000) ("[O]ur argument is that the *Cooper [v. Aaron]* rule is normatively superior to what we tendentiously call institutional anarchy."); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997) (arguing judicial supremacy permits the "settlement" of contested issues as well as coordination of social behavior); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1014 (2004) (referring to "the essential, stabilizing effect of binding decisions by the judicial branch"); Laurence H. Tribe, *On Judicial Review: Laurence H. Tribe, Jeremy Waldron, and Mark Tushnet Debate*, DISSENT, Summer 2005, at 81, 81. *But see* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 234–35 (2004) (arguing degrees of "settledness" as complex empirical questions); TUSHNET, *supra* note 137, at 27–28 (1999) (critiquing Alexander & Schauer, *supra*).

142. *See* Perry, *supra* note 6, at 869.

143. Compare the natural "pairs" between cases listed *supra* notes 94 and 95.

144. 319 U.S. 624 (1943).

School District v. Gobitis,[145] to the lasting credit of the Court. Settledness may be fragile and in some cases perhaps, rightly so.

From the standpoint of a minority or majority, many settled cases will remain settled incorrectly. People will reasonably wish to factor the perpetuation of what they take to be a substantial and continuing loss of moral or political value into account. Some people will also attach only minimal, if not actually negative, value to legal settledness. For example, Professor Seidman, while endorsing judicial review,[146] also stands the "settlement" argument for judicial review on its head. He argues that "a constitution that unsettles creates no permanent losers. By destabilizing whatever outcomes are produced by the political process, it provides citizens with a forum and a vocabulary they can use to continue the argument."[147] To Professor Seidman's view, some forms of non-settledness may enhance political legitimacy and broaden commitment.[148] Of course, on such a theory, one must also factor in any additional lack of settlement and resolution underlying the favored but controversial precedents. Most people have little persuasive grounds for assuming that the 5-4 Supreme Court votes that this article strongly endorses will be stable, while the 5-4 votes that this article proscribes will prove unstable.

It seems clear as well that settledness and uniformity in the law—to the degree the Supreme Court realistically provides such—is available elsewhere. Even a federal administrative agency might provide a single uniform voice in interpreting a statute where the courts would likely reach diverse results on the same

---

145. 310 U.S. 586 (1940). For a less enthusiastic assessment of what judicial review has meant in free speech cases, see Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 340 (1984), in which the author argues "the Court's program, taken as a whole, has done great damage to the public understanding and appreciation of the principle of free speech by making it seem trivial, foreign, and unnecessarily costly." However, as Professor Nagel recognizes, most will see this, if true, as a result of bad decisions or bad opinions, rather than of judicial review itself or its absence. *See id.*

146. *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 9 (2001).

147. *Id.* at 8. This function may of course be in some tension with other constitutional functions.

148. *See id.* at 8–9.

issue.[149] More plainly, despite partisan divides, Congress at least in particular areas could provide as much authoritative finality, uniformity, and stability to the law as could the Supreme Court. For example, consider the congressional adoption of the Religious Freedom Restoration Act[150] in response to the Court's arguably "unsettling," however otherwise justified, opinion in *Employment Division v. Smith.*[151] The fact that the Supreme Court then proceeded to reassert its supremacy in the succeeding case of *City of Boerne v. Flores*[152] hardly shows that the Religious Freedom Restoration Act would not have otherwise settled the law.[153] Strong judicial review thus offers no unique route to a particular degree of settledness in the legal system.

VI. ANALOGY BETWEEN JUDICIAL REVIEW, FILIBUSTER, AND ONE PERSON, ONE VOTE

At this point, it is natural to ask whether judicial review is unique in inspiring critics, defenders, and ambivalent parties, while in the end, it is of only modest normative import in itself. It is hard to say whether judicial review is indeed unique in this respect, but it may be most analogous to the value or disvalue, in itself, of the senatorial filibuster.[154] It is certainly possible to defend or condemn the filibuster simply in the abstract, as variously undermin-

---

149. For a general discussion, see Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources For Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). For a discussion of doubts about entrusting increased constitutional interpretive authority to the President, however, see Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 427 (2003), responding to Michael Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223 (1994).

150. 42 U.S.C. §§ 2000bb to -4 (2000).

151. 494 U.S. 872 (1990).

152. 521 U.S. 507 (1997) (readopting a free exercise test arguably modified, rather than maintained, in *Smith*, 494 U.S. 872).

153. For discussion, see Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998).

154. For historical and analytical studies, see SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE (1997); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE (2006); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

ing or, more subtly, promoting values such as genuinely democratic rule.[155]

If the analogy to judicial review were to hold, the assessments of the filibuster would likely vary with the perceived moral merits of the most significant filibusters. This article need not take a position on this issue. It is not unheard of, however, for one's view of the merits of a filibuster to be strongly influenced by one's view of the given situation, such as the 1960's civil rights legislation or the potential conservative Supreme Court and other judicial nominees that might have been presented for Senate consideration by President Bush.[156]

In fact, it was hardly rare for opponents of the Civil Rights-era filibuster or other filibusters to later express more sympathy for the judicial nominee filibuster or vice versa.[157] This is not to accuse anyone of hypocrisy.[158] The idea is merely to raise the possibility that, as with judicial review, the substantive merits of the filibuster subjects may genuinely matter more. Because judicial review is ongoing, diffuse, and less frequently employed than are filibusters, and because Court ideology tends to change haltingly and gradually, one may simply see fewer periods in which supporters and opponents of judicial review switch sides simultaneously.[159]

Thus, the history and logic of the filibuster may shed light on the idea of a principled, normative theory of judicial review. Yet, if this is so, then someone may wonder whether judicial review has gone too far. Perhaps logic would cut against trying to

---

155. *See* BINDER & SMITH *supra* note 154; WAWRO & SCHICKLER, *supra* note 154; Fisk & Chemerinsky, *supra* note 154.

156. This is not to say that in principle, the defensibility of filibustering a bill and a presidential nomination to the Court should all else equal be the same; two separate senatorial functions are involved.

157. For even shorter term switches, see, for example, David Boaz, *Filibuster Flip-Flops*, AM. SPECTATOR, Apr. 25, 2005, *available at* http://www.cato.org/pub_display.php?pub_id=3745; Posting of Jan Crawford Greenburg, When the Shoe Fits, http://blogs.abcnews.com/legalities/2007/07 (July 17, 2007, 17:02 PM EST).

158. One could argue, in good faith, that lifetime Supreme Court appointments are more important than any single civil rights statute, or the opposite, or that the mechanisms of democratic politics and checks and balances operate differently in various cases.

159. *See* Boaz, *supra* note 157; Greenburg, *supra* note 157.

develop an independent, normative theory of any legal or political institution that is typically charged with the deep intensity of partisan political or moral value commitment. Yet, this would go too far and is not logically required in discussing judicial review.

Instead, suppose that the subject were to switch to something like the principle of equal voting rights or one person, one vote in ordinary electoral politics.[160] Now, it seems possible that the same persons[161] at different times, depending upon whether the political results in the various voting cases were deemed attractive or unattractive, could endorse or reject not only the particular districting arrangements but even the basic principle itself. In this sense, one could favor or disfavor one person, one vote as an institutional arrangement, depending on the perceived resulting political payoff.

However, it would be at least equally natural and sensible to allow one's overall reaction to the general principle of one person, one vote to be dominated not by that principle's payoffs in a particular case but by the perceived moral quality of the general principle itself. Thus, one could favor voting equality, or one person, one vote, consistently on principled grounds, independent of whether this principle leads to better moral and political outcomes than another arrangement. For the average person, the virtue of one person, one vote is its status as the only system consistent with basic fairness, genuine community, equality of respect, and the equal dignity of the person.[162] This would not need to change after even a long series of unattractive electoral results that might have been avoidable under other voting systems.[163]

---

160. For a constitutional discussion, see *Baker v. Carr*, 369 U.S. 186 (1962), and the succeeding cases in its vein. For a discussion of contrary approaches, see, for example, Richard W. Krouse, *Two Concepts of Democratic Representation, James and John Stuart Mill*, 44 J. POL. 509 (1982).

161. For the rough analogy with regard to recent disputes over the filibuster, see Boaz, *supra* note 157; Greenburg, *supra* note 157.

162. In particular, see Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973–1973aa-6 (2003 & Supp. 2008), as discussed in, for example, THE FUTURE OF THE VOTING RIGHTS ACT (David L. Epstein et al. eds., 2006). For background, see Terrye Conroy, *The Voting Rights Act of 1965: A Selected Annotated Bibliography*, 98 L. LIBR. J. 663 (2006).

163. One might certainly blame supposedly bad electoral outcomes on causes other than equal voting rights, such as on patterns of electoral spending. *See* Buckley v. Valeo, 424 U.S. 1 (1974). But our point stands even if we as-

In sum, the claim that one should avoid principled, normative theorizing about judicial review as an independent value escapes two possible grounds for suspicion. One need not believe that this claim is true only of judicial review but oddly of no other well-recognized legal institution.[164] On the other hand, one need not reach a similar conclusion with regard to all other well-recognized legal institutions.[165] Reassuringly, in the respects this article has examined, judicial review is special but not utterly unique.

VII. CONCLUSION: HOW JUDICIAL REVIEW COULD FAIL TO INDEPENDENTLY MATTER

It has been the main contention of this article that regardless of whether people have favorable, unfavorable, or mixed feelings about judicial review, trying to develop some principled, normative theory of judicial review amounts to misspent effort. Certainly, it may well make sense within one's scheme of values to care strongly about cases such as *Brown v. Board of Education*[166] or *Roe v. Wade*[167] or about some governmental outcome that was never judicially reviewed. It also may make sense to try to summarize one's reactions to many such cases, favorable or unfavorable, in a normative theory of some sort. This analysis could focus mainly on the past, on the recent past, or else on the presumed near-term or long-term future.

In the end, there should be little to one's normative view of judicial review apart from one's substantive moral and political reactions to how those cases came out and the ensuing consequences. If the personally crucial cases had been decided differently, presumably one's normative theory of judicial review would correspondingly be modified. One's more principled view, favorable or unfavorable, of judicial review in itself, apart from the political merits of crucial judicial outcomes, would amount mainly to

---

sume that equal voting rights itself is somehow inescapably responsible for undesired voting outcomes.

164. For a discussion of the filibuster, see *supra* notes 154–59 and accompanying text.

165. For a discussion of the equal voting rights, see *supra* notes 160–63 and accompanying text.

166. 347 U.S. 483 (1954).

167. 410 U.S. 113 (1973).

a mixture of guesswork, arbitrary preference and redefinition, question-begging, and mere speculation.[168] Most observers should allow their best substantive normative assessments of crucial past or future instances of judicial review to dominate their overall normative assessment of judicial review, especially if the assumed inherent virtues or vices of judicial review do not necessarily all point in the same direction.

168. For example, see the illustrative claims and responses made for and against various forms of judicial review, *supra* Part V. We shall, sensibly, assume in contrast that someone could take a strong view for or against a number of Supreme Court precedents without relying on this sort of arbitrariness, guesswork, question-begging, or speculation, and on genuinely principled grounds.